Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of the Transmissions	)	CS Docket No. 98-120
of Digital Television Broadcast Stations	)	
	)	
Amendment to Part 76	)	
of the Commission's Rules	)	

COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

The Commission should not, and legally cannot, adopt requirements that would obligate cable television systems to carry the signals of new digital broadcast channels during the transition from analog to digital television broadcasting.

Too little is known about the development and public acceptance of DTV for the Commission to base a must carry requirement on reasoned judgment. Broadcasters have not determined how they will use their DTV channels, whether for high definition television or multiplexed transmission of multiple lower definition channels. Their choice, ultimately will be determined by marketplace acceptance and too little is known for the Commission to even hazard a guess as to the outcome. The public, faced with the prospect of buying extremely expensive DTV receivers, and not knowing what will be transmitted, has yet to speak and their choices cannot be known at this early date. The questions posed by the Commission may be suitable for an inquiry but cannot now yield the level of information necessary for the Commission to act.

The Commission has gone to great lengths to assure that the new digital broadcasting service will be available to viewers off-the-air through the use of conventional antennas. The ability to receive DTV signals over-the-air through the use of input selector switches integrated into receivers makes any must carry requirement unnecessary. The existence of integrated input selectors renders

empty rhetoric any suggestion that cable systems can act as gatekeepers or can be a bottleneck to the reception of DTV.

A digital must carry requirement during the transition period without the substantial record to justify it would violate the First Amendment. The must carry regulations for analog channels survived First Amendment challenge because it was determined that the Congress was able to make reasonable inferences based on a substantial record. Digital broadcasting is a brand new service. By definition, no substantial record can exist that would permit a finding that an imposition on cable operators' speech is justified.

A digital must carry requirement would be a taking of property in violation of the Fifth Amendment. By whatever Fifth Amendment analysis is employed, a mandatory requirement that cable systems carry digital signals simultaneously with their analog counterparts for an as yet undetermined period of time would represent a permanent taking of a cable operator's physical property without just compensation.

The Cable Act of 1992 does not specifically authorize the Commission to mandate the carriage of DTV channels simultaneously with the carriage of analog channels. Indeed, a plain reading of the Act makes it clear that a mandatory carriage requirement for digital channels is to be ensured only after the transition to digital broadcasting is complete. A Commission requirement for carriage of DTV channels would be invalid because the Commission lacks authority. Furthermore, any such requirement would be invalid because such an

interpretation would subject the federal government to claims for the taking of property under the Tucker Act, thereby usurping the authority of the Congress to appropriate funds.

The imposition of must carry requirement for DTV channels is unnecessary. It can be assumed that once a demand for such service exists, cable television operators will carry the digital broadcasts. Many broadcasters and cable operators have already reached agreement for digital carriage. Thus, it is likely that, given the opportunity, the marketplace will work its own solution in a reasonable period of time and action by the Commission would not only be premature, but unnecessary

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COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION

1. The Cable Telecommunications Association, CATA, hereby submits its comments in the above-captioned proceeding. CATA is one of the two national trade associations representing the cable television industry. CATA's membership consists of cable television system owners and operators nationwide serving over 55 million cable television customers.

INTRODUCTION AND BACKGROUND

2. In its Notice of Proposed Rulemaking in this proceeding the Commission has diligently spread before us the literally hundreds of questions surrounding the issue of the carriage by cable systems of the nascent digital broadcast

service.[1] All the bases have been covered. All permutations have been considered. The very breadth and depth of the Notice, however, suggests that perhaps the Commission might better have formulated its Notice as one of inquiry and not proposed rulemaking. Neither the Commission nor any commenting party will be able to provide answers to many of the questions posed. Many are unanswerable at this time. Digital broadcast television is a new medium, and one that is totally untested in the marketplace. Even the technology has yet to be proved. The consumer receiving equipment has not been standardized or subjected to the rigors of consumer use. That being true, the Commission should not act precipitously by adopting any regulations prior to gaining a fuller understanding of the implications, nature and acceptance of this new medium. Under these circumstances, while the Commission is to be applauded for asking all the right questions, it has no reason to assume that it will receive meaningful answers, much less the detailed information necessary for the adoption of regulations.

3. Chairman Kennard called for a cessation of empty rhetoric in favor of careful consideration and factual analysis of the many questions posed when this Notice was first issued. Unaccustomed as we are to eschew rhetoric, CATA intends to adhere to the admonition of the Chairman. We are hopeful that all parties follow that course, including the Commission. To this end we will limit our

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[1] In the Matter of Carriage of the Transmissions of Digital Television Broadcast Stations, CS Docket No. 98-120, NPRM, released July 10, 1998 (hereinafter Notice).

comments to a few specific points since most of the questions raised herein simply cannot be answered at this time. For instance, it is "empty rhetoric"[2] to suggest that digital television broadcasting will find swift acceptance from the American viewing public. We don't know that and cannot prove it in any way prior to observing public reaction to both the technology and the market price it will exact. There can be no claim that the use to which this new medium is put will or will not be in the public interest. We do not know what it will be yet, and neither do the new license holders who have been given 6 MHz of spectrum and told that as long as they provide a "channel" of free broadcasting, they can do whatever they want. It is safe to say that most broadcasters have not determined an appropriate business plan for the use of the spectrum.

4. The Commission has stated that the purpose of the proceeding "is to seek comment on the broadcast signal carriage responsibilities of cable television operators in the evolution toward digital broadcast television ("DTV")."[3] To this we say, respectfully, perhaps cable's responsibilities, if any, would be better examined once a little evolution has occurred. Even the first group of stations required to begin DTV transmissions have not solidified their plans. It is not clear

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[2] We note, with relief, that there is nothing pejorative about rhetoric per se, -- only when the words and argumentation used cannot be supported does rhetoric become "empty."

[3] Notice at para. 1.

whether transmissions will concentrate on movies or sports.[4] Mobile and studio equipment is in short supply. Almost no one yet owns a DTV receiver. Thus, at the present time, cable's role is not clear. The Commission has stated that it wants to retain the competitiveness of broadcast television and successfully introduce digital broadcasting and then recover broadcast spectrum. This is all well and good, but is not cable's responsibility.

5. If the objective is to promote a *competitive* broadcast television industry, without regard to the programming distributed by that medium, then is it not self-defeating to rely on the crutch of cable carriage? If the idea is that broadcasters will now be able to distribute crystal clear pictures and multiple channels, thus allowing for an *alternative* to cable subscription, should not the Commission focus on making sure that the new technology it is promoting can actually deliver? Instead, "must carry" seems to suggest that the technology cannot really compete, but rather must be artificially supported by cable in order to reach viewers. Thus digital television would not be competing as a new technology but, rather as just another programming source seeking cable carriage in order to reach the marketplace. But surely the Commission's efforts cannot be simply to favor one programming source over another. Such an undertaking would not only raise very considerable First Amendment concerns but would not be worthy of the Commission. Thus, if what has been created is to compete as a new

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[4] Glen Dickson, CBS to Broadcast NFL in HDTV, BROADCASTING & CABLE, Oct. 5, 1998 at 6.

technology, CATA says let it compete. The quintessential "empty rhetoric," if one believes that DTV technology works, is to label cable a "gatekeeper" or "bottleneck". The whole idea of DTV, as a technology, is to effectively *circumvent* cable. Either way, we cannot know the answers to the basic question of whether the technology works well enough in the marketplace to fulfill that role until it is deployed. If that is so, then the legal basis for digital "must carry" is on very weak ground. The government would simply be favoring one speaker over others. If that is not so – that is, if the technology works and can truly act as an alternative to cable delivery, then there is no need for "must carry."

THE EXPERIENCE WITH THE INTRODUCTION OF COLOR TELEVISION DEMONSTRATES THAT THE TRANSITION FROM ANALOG TO DIGITAL BROADCAST TELEVISION MAY BE PROLONGED

6. At this early stage of DTV development projections are easy to make but difficult to support. The questions of how rapidly DTV will become popular (if at all), how rapidly DTV receivers will be purchased, how rapidly the high prices for such receivers will come down -- cannot be answered by wishful thinking. The answers will come with the passage of time as consumers react to the new technology. Until then we are limited only to educated guesses. The Commission's own educated guess, necessary to set a target date for reclamation of analog spectrum, was that by 2006 the new DTV technology will

have become so universally accepted that analog service could be terminated. Of course, no one would attempt to hold the Commission to its projection and the Commission wisely left room for an adjustment of this date. It is widely assumed that the 2006 date was overly optimistic. As the Commission noted in its Notice in this proceeding, even the Congress has second guessed the date in the Balanced Budget Act of 1997. By that Act it will not be until 85 percent of the homes in a market have digital receivers (or converters) that television broadcasters will be required to return their analog channels.[5]

7. Even though there is uncertainty surrounding the date when the NTSC standard will be abandoned, it is nevertheless necessary to attempt some forecast because the primary issue here is the duration of the transition period during which the Commission might impose a must carry requirement for DTV channels. Our own imperfect projection is that the transition period will last a long, long time. The analogy we use is based on the public acceptance of color television, admittedly a different technology at a different time, but still the closest example we can find where a change to the NTSC standard resulted in the sale of new, expensive television receivers.[6] An examination of the factors surrounding the introduction and acceptance of color television may be

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[5] See Notice at para. 12.

[6] The All Channel Receiver Act of 1962 merely required television receivers to be able to tune UHF channels. The All Channel Receiver Act of 1962, Pub. L. No. 87-529, 76 Stat. 150 (1962), 47 U.S.C. 303(s). UHF tuners had been available for a long time, and the addition of UHF tuners did not substantially increase the price of television receivers.

instructive.

8. The Commission adopted the NTSC compatible color standard on December 17, 1953.[7] Unlike the DTV decision which is flexible and permits various formats, the NTSC color standard was, in the tradition of the day, not flexible at all. And although, this lack of flexibility was not calculated to promote the marketplace competition to which we aspire today, it did provide certainty, a commodity we do not have today. Thus, in the case of DTV, we do not know what aspect ratio will be used, the number and character of the channels that will be broadcast, or even how well defined images will be. The certainty of the NTSC color standard might have been expected to spur color development but, as we shall see, this was not the case. Of course, the Commission did not mandate that stations begin broadcasting in color by a date certain. That decision was left to individual broadcasters. Many stations did not convert to color broadcasting until the late 1960s, but networks began a degree of color programming immediately. Early in 1954 the NBC network broadcast two to three live color shows a week. CBS broadcast one show a week, but only to two cities where stations had the necessary equipment.[8]

9. For the first several years color sets cost between $800 and $1200

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[7] Rules Governing Color Television Transmission, Docket No. 10637, Report and Order, adopted December 17, 1953.

[8] [1954] 10 TELEVISION DIGEST, No. 5; [1954] 10 TELEVISION DIGEST, No. 7.

dollars, about five times the cost of black and white sets.[9] By contrast, DTV receivers at present cost between $8000 and $10,000, about 16 times the cost of the average NTSC receiver. In the 1950s, as now, projections of the new medium's success were a cottage industry. Fortune magazine predicted that by 1959, one out of three sets in use would be color sets.[10] As a measure of how overly optimistic prognostication can be, it may be sobering to note that by 1959, six years after color was first introduced, only 0.6% of households owned color television sets.[11] Fortune's prediction was not realized for another eleven years --- until 1970 --- even though by 1958 the price of receivers had fallen to as low as $495.00, a little more than twice the cost of the largest black and white receiver.[12] Color sets were not widely advertized until 1963-64. At that time, a 21" color set cost around $300, approximately twice the cost of a comparable black and white receiver.[13] It was not until late 1971, however, eighteen years after color's birth, that even half the homes in the country (let alone 85%) owned

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[9] [1954] 10 TELEVISION DIGEST, No. 7.

[10] [1954] 10 TELEVISION DIGEST, No. 9.

[11] Consumer Electronics Manufacturers Association, Color TV Receivers - U.S. Sales to Dealers, EIA-CEMA Research Center, January 1998.

[12] [1958] 14 TELEVISION DIGEST, No. 1.

[13] This number is based on an analysis of advertisements in the Washington Post during December, 1964. It represents the cost of a table model receiver.

color sets.[14]

10. The fact is, it took a long time for the color system to achieve the ubiquitous acceptance that we have grown to assume. The analogy to DTV is not perfect, of course. To some extent the public's reticence to embrace color may have been because early color sets were not very good. Proper color was difficult to obtain and was not stable. The sets needed constant adjustment. Hopefully, quality will not be an issue with DTV receivers -- certainly not at the prices being charged -- but, in fact, we don't know. It is apparent that the first DTV receivers are far from the best that will be offered in the future. They do not now display the highest definition permitted under the Commission's standards, nor are they equipped with inputs for other devices, let alone cable systems. As may have been the case with early color receivers, people may wait for subsequent generations of devices.[15] In the very early days of color, the production of receivers was hampered by the difficulty of manufacturing color picture tubes.[16] No television receiver in the 1950's was as robust as even the least expensive receiver today, and color sets were particularly prone to breaking

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[14] [1971] 27 TELEVISION DIGEST, No. 52; See also BRITANNICA BOOK OF THE YEAR, 1973.

[15] For instance, since DTV (HDTV in particular) appears to best advantage on very large screens, it may not be until large, flat screens that can hang on a wall become widely available that DTV will become as popular as its enthusiasts presume.

[16] [1954] 10 TELEVISION DIGEST, No. 14.

down.[17] These factors probably contributed to the public's unwillingness to wholeheartedly embrace the new technology. (We do not yet know what technical features will be available on the new array of DTV receivers now entering the market. We do know, however, that the new "component" sets are incompatible with each other). Other factors, however, were similar. Advertisers were slow to support color programs, because so few viewers would see their products.[18] Advertiser support for DTV programming will undoubtedly lag as well.

11. Even though the past here is an imperfect prologue, it is the only prologue we have and lessons can be learned. Just as was the case with color receivers, we cannot predict how quickly the cost of DTV receivers will decline, although surely they will. We do know that their starting price is incredibly high and we know that even after color receiver prices had come down by two thirds, it was still eight years before even half the household owned a color set. What do we make of all this? CATA believes that a study of the past suggests that it is not unreasonable to expect that it will take two decades before most homes have DTV receivers. If it was ever the Commission's intent to force consumers to buy

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[17] In 1954 a Philco service manager reported that color sets would average 6-10 service calls a year, double that of black and white receivers. Service contracts were popular. [1954] 10 TELEVISION DIGEST, No. 3.

[18] [1954] 10 TELEVISION DIGEST, No. 18 (Referencing remarks of Frank Stanton, President of CBS and Sylvester Weaver, President of NBC at the 1954 Annual Convention of Advertising Agencies.)

DTV sets by setting an early date for retirement of the NTSC standard, Congress has now decreed that consumers will be the judge. Like black and white television receivers, analog receivers are likely to be around for a long time. The transition period may outlive most of those commenting in this proceeding. The Commission should not consider commandeering the channels of cable systems to support what may only be a long and unsuccessful experiment.

THERE IS NO REQUIREMENT FOR THE COMMISSION TO ACT

12. As the Commission notes, this proceeding is triggered by the statutory provisions in Section 614(b)(4)(B) of the Communications Act.[19] Other commenting parties will be filing detailed analyses of this Section and its meaning. In particular, CATA associates its views on this matter with those of the NCTA. We intend here to simply point to the necessity for reading the provision in "plain English". There never has been a requirement for simultaneous carriage of two signals of the same licensee. Indeed, the requirement for "must carry" of a single channel was subjected to extensive legal scrutiny with the ultimate decision of the Supreme Court hinging on the reasonableness of Congressional determinations that had followed extensive and substantial investigation.[20] The Court made clear that it did not have to

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[19] 47 U.S.C. § 614(b)(4)(B).

[20] Turner Broadcasting System, Inc. v. F.C.C., 117 S.Ct. 1174 (1997)(hereinafter Turner II).

agree with Congressional conclusions, so long as Congress had substantial evidence upon which to make those conclusions.

13. As the Commission notes in footnote one of the Notice, "There is little discussion of this provision in the Act's legislative history."[21] Congress was well aware of the legal struggle over "must carry," and the Supreme Court's conclusions. It defies logic to suggest that Congress intended Section 614 (b)(4)(B) to be read as requiring that an entirely new set of licensed signals would have to be carried by cable operators as well as the ones already currently carried pursuant to the Commission's rules without *any* significant legislative history as to the impact, intent, need, etc. of such a requirement. We may presume that the Congress was aware that for some period of time television broadcasters would be using two channels, one for NTSC and one for DTV transmissions. In September of 1990, the Commission issued an Order making it clear that it was abandoning consideration of augmenting present NTSC allotments with additional spectrum and instead intended to allocate a separate DTV channel.[22] It is difficult to believe that knowing this Congress did not address the implications for "must carry" if its intent was that "must carry" would apply to DTV signals throughout the inevitable transition period. Of course, if

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[21] Notice at para. 2, n.1.

[22] In the Matter of Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, MM Docket No. 87-268, First Report and Order, 5 FCC Rcd 5627, released September 21, 1990.

Congress had no appreciation of the Commission's action, then it cannot be argued that it intended "must carry" to apply to two channels for each broadcast station. It makes far more sense to read the Congressional intent in its plainest language: when the stations *currently being carried* pursuant to the *existing* rules "change" to conform with new technical rules, then the "must carry" rules should reflect the fact that those television stations *"...which have been changed to conform with such modified standards"* are still "...ensure(d) cable carriage."[23] The current debate is not about television stations which have been changed to conform to the modified standards. It is about additional television stations – new licenses, for new stations – that will operate for an indeterminate term until such time as those original stations "change" permanently into the new format. We do not know when that will happen – if ever.

14. It is simply not credible to suggest that Congress intended to create a massive new obligation on the cable television industry and significantly affect all cable customers without even considering the impact or consequences of that obligation. We are not here talking about a "must carry" rule that has very limited effect, since most signals already were being voluntarily carried under the analog regime. Here we are talking about a 100 percent increase in the carriage obligation since each existing broadcaster who currently has "must carry" rights will also have an additional license for DTV. Had Congress meant to create such

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[23] See 47 U.S.C. 614(b)(4)(B).

an imposition during the transition period it could have explicitly said so. It did not. The Commission has no Congressional mandate to create such an obligation, and, indeed, as our discussion of the First and Fifth Amendment amply points out, it is questionable whether the Commission has the power to create such an imposition.

FIRST AMENDMENT IMPOSITIONS REQUIRE SUBSTANTIAL BASIS

15. There are several basic premises to which the Commission must adhere when dealing with the issue of "must carry". CATA has had a long history with the Commission of debating "must carry," and we will not repeat all of that (supportable) rhetoric here. However, several "truths" seem evident, the first being that any type of "must carry" is an imposition on speech and subject to First Amendment scrutiny.[24] In its review of the current "must carry" rules, the Supreme Court made it clear that a balancing test, measuring potential benefit versus harm, using intermediate scrutiny, was appropriate. In reviewing the statute, substantial deference was accorded to the predictive judgments of Congress. However the court noted that its obligation was "to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."[25] Most important in the context of this proceeding, the

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[24] Turner II, 117 S.Ct. 1174.

[25] Turner II, 117 S.Ct. at 1189 (quoting Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 666 (1994))(hereinafter Turner I).

Court, citing Turner I, specifically said that "...substantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency."[26]

16. Thus, there can be no question that First Amendment rights are involved in any imposition of "must carry", and that any such imposition – especially one imposed by an administrative agency – must be based on "substantial evidence" that the articulated legitimate government interest is not outweighed by the admitted imposition on First Amendment rights. In the case of digital broadcasting there is no such evidence. There cannot be any since in virtually the entire United States digital broadcasting to private homes does not yet even exist. There can be no reasonable prediction of carriage or non-carriage. There can be no reasonable assessment of the value of such carriage. There can be no factual basis upon which to impose First Amendment burdens, since the subject of all this speculation – digital broadcasting – has yet to be introduced into the public marketplace in any meaningful way. Indeed, if there is to be any current (and we acknowledge, premature) measure of the significance of cable carriage of digital broadcast signals, one would have to conclude there is no significance at all. The only current indicator has been supplied by the consumer electronics industry, one of the main proponents of this new form of television, which has chosen to design the first generation of digital television receivers

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[26] Id.

without even the capability to receive digital signals from cable systems or any other source! These sets are designed to receive digital signals only over-the-air. Certainly those sets would not have been built had the electronics manufacturers concluded that digital television transmission would not work without cable carriage. Indeed, they state just the opposite, that over-the-air transmission of digital broadcasting is viable. Thus, there is no current evidence, let alone "substantial" evidence of the immediate need for digital "must carry" sufficient to pass First Amendment muster.

17. After the remand in Turner I, Turner II proceeded with an amassed record described as including, "18 months of factual development...yielding a record of tens of thousands of pages of evidence comprised of materials acquired during Congress' three years of preenactment hearings,...as well as additional expert submissions, sworn declarations and testimony, and industry documents obtained on remand."[27] The Commission presumably anticipates that a legal challenge to any additional "must carry" imposition at this time would be a surety. CATA maintains, however, that far from the substantial record as represented by the bales and boxes of information collected by the Justice Department on remand from Turner I, in the present "must carry" proceeding, the Commission has nothing to offer but its hopes and the empty rhetoric of DTV proponents that DTV does well.

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[27] Turner II, 117 S.Ct. at 1185.

18. Without minimizing the Commission's work since 1988, we are constrained to question the important public benefits that might justify an imposition on cable operators' speech. Better pictures? An as yet undetermined amount of money to be obtained at auction when NTSC spectrum is reclaimed? Surely these are not the types of national goals that a court would deem sufficient to abrogate the First Amendment rights of cable operators. Nor can the Commission seriously maintain, or find a record to support the proposition, that mandatory carriage of digital broadcast channels during the transition period is necessary to preserve the fabric of local broadcasting.[28] The warp and weave of that cloth has already been preserved in the Turner cases.

A SIMULTANEOUS CARRIAGE REQUIREMENT VIOLATES THE 5TH AMENDMENT – AND EXCEEDS THE COMMISSION'S AUTHORITY

19. Whenever the government reaches out to dictate the use of private property, it is reasonable to question its authority. Cable television operators are private entrepreneurs who have invested heavily in coaxial cable, optical fiber, headend equipment, etc. in order to sell their services – for the most part, video

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[28] It is of interest that a survey of five markets conducted by the Media Access Project and the Benton Foundation shows that seventy percent of the commercial stations do no local public affairs programming, 35 percent provide no local news and 25 percent offer neither local public affairs programming nor local news. Twenty five percent of the stations carry no local programming at all. Media Access Project and Benten Foundation, What's Local About Local Broadcasting, April 1998, available at www.benton.org. Lest we blaspheme, it appears that a government interest in preserving the shred of localism that exists in broadcasting today does not justify an imposition on speech.

programming – to the public. If the Commission is contemplating a requirement that additional channels be devoted to the carriage of both analog and digital broadcast stations, it is time for a serious look at the Fifth Amendment. CATA maintains that any simultaneous carriage requirement would be a taking of property without just compensation, in violation of the Fifth Amendment.

20. It is interesting, however coincidental, that the Supreme Court has made one of its most significant Fifth Amendment rulings in a case involving a cable television system – Loretto v. Teleprompter Manhattan CATV Corp.[29] At issue in Loretto was a New York law that prohibited a landlord from interfering with a cable company's installation of cable television facilities upon her property in return for a one-time $1.00 payment. In reliance on the statute, Teleprompter installed on Loretto's building a cable slightly less than one-half inch in diameter and approximately 30 feet in length. Loretto sued, claiming that the installation of the cable constituted a taking without just compensation. The lower court analyzed the case using the traditional ad hoc balancing test examining such factors as the economic impact of the regulation, the extent to which it interfered with Loretto's investment backed expectations, and the character of the government action. The lower court determined essentially that the physical occupation of Loretto's building was not so significant as to constitute a taking, and the statute was justified because it had a valid public purpose. The

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[29] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 417 (1982).

Supreme Court reversed this judgement.

21. The Court held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[30] Loretto stands for the proposition that a permanent physical occupation is a *per se* taking and neither the motive of the government nor the harm done to the property owner is an issue. In the case of such a *per se* taking, all that remains to be resolved is the amount of compensation. We argue that any simultaneous carriage requirement the Commission might adopt would be stricken down under Loretto. Indeed, even if the more traditional ad hoc balancing test were applied, a simultaneous carriage rule would fail to pass judicial scrutiny.[31]

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[30] Loretto, 458 U.S. at 426.

[31] Although a Fifth Amendment challenge to the Cable Television Act's analog "must carry" requirement was apparently not pursued through the appellate levels of litigation in the Turner cases, it was raised at the District Court level by several petitioners. The lower court did not reach their argument, and the case proceeded upward dealing only with First Amendment issues. In a footnote to his dissent from the court's opinion, however, Judge Williams offered a concise, even tantalizing explanation of the problem and how the law might be applied to the analog "must carry" rules, let alone to any requirement for simultaneous carriage of analog and digital channels.

> Because of my conclusion on the First Amendment challenge to the must-carry provisions, I do not reach the contention of TWE and Daniels that those provisions also represent an unconstitutional taking of cablecasters' property in violation of the Fifth Amendment. I do not, however regard the claim as frivolous. The creation of an entitlement in some parties to use the facilities of another, *gratis*, would seem on its face to implicate *Loretto v. Teleprompter Manhattan CATV Corp.*, ... where the Court struck down a statute entitling cable companies to place equipment in an owner's building so that tenants could receive cable television. The NAB responds that Loretto is limited to "physical" occupations of "real property". ... But the insertion of local stations' programs into a cable operator's line-up presumably is not a metaphysical act, and presumably takes place on real property. Turner

22. A cable company has an ownership right in its video delivery system, which is composed of physical tangible objects, such as optical fiber, coaxial cable, amplifiers and head end processing equipment. A cable system is physically limited in the number of channels available to carry programming. Requiring a cable company to carry the digital broadcast channels would seriously impact its right "to possess, use and dispose of its property."[32] The confiscation of significant capacity on a cable system would deprive a cable company of its right to exclude those whom it wishes to exclude, and further preclude it from using the channels for programming of its choice. The capacity of a system is the ability of its physical plant to carry signals. Occupation of channel capacity is the physical occupation of part of the physical plant.

23. The physical occupation of a system's property, even if required only during a transition period from analog to digital broadcasting would, for purposes of Fifth Amendment analysis, clearly be considered permanent. In Hendler v. U.S. the U.S. Court of Appeals for the Federal Circuit made it clear that "'permanent' does not mean forever or anything like it. A taking can be for a limited term..."[33] The court distinguished permanent from "temporary,"

Broadcasting System, Inc. v. F.C.C., 819 F.Supp. 32, n.10 (D.D.C. 1993). (Williams, J., dissenting) (citations omitted) (emphasis added).

[32] See Loretto, 458 U.S. at 435 (citing U.S. v. General Motors Corp., 323 U.S. 373, 378 (1945)).

[33] Hendler v. U.S., 952 F.2d 1364, 1376 (Fed. Cir. 1991).